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APR 15 1996

April 15, 1996

Mr. William F. Caton, Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D. C. 20554

DOCKET FILE COPY ORIGINAL

In the Matter of:

Amendment of Parts 20 and 24 of Commission's)
Rules -- Broadband PCS Competitive Bidding and)
the Commercial Mobile Radio Service)
Spectrum Cap)

WT Docket No. 96-59

Amendment of Commission's Cellular PCS)
Cross-Ownership Rule)

Gen. Docket No. 90-314

Dear Mr. Caton:

Enclosed are an original and eleven copies of the Comments of Cincinnati Bell Telephone Company in the above referenced proceeding. A duplicate original copy of this letter and attached Comments is also provided. Please date stamp this as acknowledgment of its receipt and return it. Questions regarding these Comments may be directed to Ms. Amy Collins at the above address or by telephone on (513) 397-1333.

Sincerely,

Deborah A. Disch

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**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

APR 15 1996

In the Matter of Amendment of Part 20)	WT Docket No. 96-59
and 24 of the Commission's Rules --)	
Broadband PCS Competitive Bidding and)	
the Commercial Mobile Radio Service)	
Spectrum Cap)	
)	
Amendment of the Commission's Cellular)	GEN Docket No. 90-314
PCS Cross-Ownership Rule)	

COMMENTS OF CINCINNATI BELL TELEPHONE COMPANY

Cincinnati Bell Telephone Company ("CBT") hereby submits its comments to the Commission in response to the Notice of Proposed Rule Making, FCC 96-119, adopted and released March 20, 1996, in the Matter of Amendment of the Commission's Cellular PCS Cross-Ownership Rule. CBT's comments are limited to the cellular attribution rules as they pertain to the spectrum caps and eligibility to hold PCS licenses. CBT suggests that the Commission adopt appropriate rule amendments incorporating a single majority shareholder exception to the cellular attribution rules, rendering CBT eligible to hold PCS licenses in the same geographic area in which its affiliate holds a non-controlling minority interest in a cellular licensee. The attribution rule should be modified as to all PCS licenses, including both the 30 MHz licenses that have already been awarded and the 10 MHz licenses that are yet to be auctioned.

BACKGROUND

On June 28, 1990 the Commission released a Notice of Inquiry¹ initiating its investigation of personal communications services ("PCS"). In the Second Report and Order in this docket,² the Commission promulgated eligibility rules for owners of cellular interests to participate in PCS licensing. One of those rules was 47 C.F.R. § 24.204(d)(ii), which treated a partnership or stock interest amounting to twenty percent or more of the equity of a cellular licensee as an attributable interest, such that the owner of that interest would be ineligible for a 30 MHz PCS license. Because one of its affiliated entities is an owner of such a limited partnership interest in a cellular partnership, that rule rendered CBT ineligible for the 30 MHz licenses in the Cincinnati MTA.

On December 8, 1993, CBT participated in a Joint Petition for Reconsideration,³ requesting the Commission to reconsider the attribution rules. CBT asked the Commission to amend the rule so as to exclude from attribution minority partnership and stock interests where a single separate entity held a majority controlling interest in the cellular licensee. The Commission rejected this suggestion, instead affirming the eligibility restrictions adopted earlier.⁴

¹ Notice of Inquiry, GEN Docket No. 90-314, 5 FCC Rcd 3995 (1990).

² Second Report and Order, (FCC 93-451), adopted September 23, 1993, released October 22, 1993, 8 FCC Rcd 7700 (1993).

³ Petition for Reconsideration of Chickasaw Telephone Company, Cincinnati Bell Telephone Company, Illinois Consolidated Telephone Company, Millington Telephone Company and Roseville Telephone Company, GEN Docket No. 90-314, filed December 8, 1993.

⁴ Memorandum Opinion and Order (FCC 94-144), GEN Docket No. 90-314, adopted June 9, 1994, released June 13, 1994, 9 FCC Rcd 4957 (1994).

CBT filed a Petition for Review of the Commission's June 9, 1994 Memorandum Opinion and Order with the Sixth Circuit on July 1, 1994. While the appellate proceedings were pending, CBT simultaneously filed a request for waiver of the cellular attribution rule and a Motion for Stay of the A and B Block auctions with the Commission on July 21, 1994. CBT asked the Commission to waive Section 24.204 to permit CBT to bid on and obtain the same amount of broadband PCS spectrum as an entity having no attributable cellular interests. The basis for the waiver request was that CBT had absolutely no control over the cellular partnership such that application of the cellular attribution rule to CBT served no legitimate purpose. The Commission did not act on CBT's request for waiver until November 3, 1994, after the October 28, 1994 deadline for registration for the A and B Block auction. Even then, the Commission did not waive the attribution rule for CBT but, rather, merely extended the length of time CBT would have in which to divest itself of an attributable cellular interest. The ruling on the waiver request would not have allowed CBT to obtain an interest in a 30 MHz PCS license if its affiliate kept its present cellular interest. In the meantime, the Commission also had issued the Third Memorandum Opinion and Order,⁵ which amended the eligibility rules to allow a minority cellular owner to bid upon a 30 MHz PCS license conditioned upon a commitment to divest itself of the cellular interest within ninety days.⁶

⁵ Third Memorandum Opinion and Order, (FCC 94-265), adopted and released October 19, 1994, published November 7, 1994.

⁶ CBT filed a separate Petition for Review of this Order with the Sixth Circuit Court of Appeals on January 6, 1995. This Petition was consolidated with the earlier filed Petition for Review of the June 9, 1994 Order.

The Commission never acted upon CBT's Motion for Stay. The A and B Block auctions went forward beginning December 5, 1994, even while CBT's challenge to the eligibility rules was pending in the Court of Appeals and its stay request was pending before the Commission. The A and B Block auctions thus were conducted under a cloud, with full notice to all participants that the eligibility rules under which the auction was being conducted might be invalid. On November 9, 1995, the Sixth Circuit Court of Appeals granted CBT's Petition for Review, declaring that the cellular attribution rule was arbitrary and capricious.⁷

CBT Supports A Single Majority Shareholder Exception to the Attribution Rules

CBT suggests that the Commission correct the cellular attribution rule by adopting the following addition to 47 C.F.R. § 24.204(d)(ii), in addition to any other parallel changes⁸ to Commission rules necessary to render the rules consistent with the Sixth Circuit's opinion:

No minority stock or limited partnership interest will be attributable if a single holder (or group of affiliated holders) owns more than 50% of the outstanding stock or partnership equity or has voting control of the licensee's affairs.

⁷ Cincinnati Bell Telephone Co. v. FCC, 69 F.3d 752 (6th Cir. 1995).

⁸ The Commission noted in the Notice of Proposed Rulemaking that the 45 MHz CMRS spectrum aggregation limit follows the same attribution standards with respect to cellular interests. That rule has always been identical to the PCS-cellular attribution rule and any changes have been made in lockstep. There is no reason to have an inconsistency between the two rules and the same changes should be made to the 45 MHz spectrum cap attribution rule as are made to the PCS-cellular attribution rule. To not apply the same rules to both situations would be arbitrary and capricious.

CBT believes that this rule would address its objections to the Commission's earlier rulemakings, which led to the Sixth Circuit decision, and would remove the arbitrary treatment the earlier attribution rule afforded CBT. CBT urges the Commission to implement such rule as soon as possible⁹ to be applicable to all PCS licenses, whether they encompass 30 MHz or 10 MHz of bandwidth.

The original purpose of the cellular attribution rule was to prevent an entity from controlling an excessive amount of wireless spectrum. The rule assumed that entities holding an attributable cellular interest had the capability to control or significantly influence the business of the cellular licensee, such that having control of both a cellular and PCS licensee in the same geographic market would be anticompetitive. CBT supports the Commission's efforts to diversify the ownership of wireless licenses, but clearly the old cellular attribution rule went too far and had the opposite effect. CBT believes that the persons controlling the existing cellular licenses ought not be allowed to control the new PCS licenses. Such common control would restrict the market to a few players and give too much market power to those having both cellular and PCS licenses. Persons who do not control cellular licensees, however, ought to be free to participate in PCS.

The Commission's stated reason for the cellular attribution rule was to promote competition. However, in CBT's case, the now vacated rule would have had exactly the opposite effect. As CBT has discussed at length in earlier comments, it has absolutely no influence on the cellular partnership in which its affiliate holds a minority limited partnership

⁹ Since the rule suggested above is fully supported by the record in this proceeding, there is no need to conduct further rulemaking proceedings on this matter.

interest. Due to Ameritech's complete control over the cellular partnership, CBT's affiliate has absolutely no ability to use or control any cellular bandwidth, even though the rule would charge it with control of the entire 25 MHz. It is patently unfair for CBT to be regarded as a controlling person of the cellular licensee with the effect of preventing it from participating in the PCS market either. The old cellular attribution rule foreclosed CBT from being in either the cellular or PCS markets.

The single majority shareholder exception satisfies the Commission's concern that determination of control be a simple process capable of quick administrative determination. Where there is one entity (or group of affiliated entities) that controls a majority of a cellular licensee, whether it be through stock interests in a corporation or general partner interests in a limited partnership, it is simple to determine who controls the cellular licensee. The Commission's choice of a 20 percent bright line test for control provided no opportunity for a non-controlling minority owner holding more than 20 percent of the equity to demonstrate that it had no control.¹⁰ A single majority shareholder exception to the rule would not only create that opportunity, but would also be simple to administer.

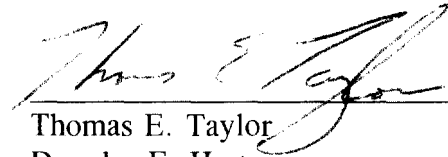
CONCLUSION

Now that the Sixth Circuit has declared the eligibility rules invalid for the very reason that the rules had excluded CBT from the auction, the Commission has no real choice but to

¹⁰ The FASB standard upon which the 20 percent rule was based was only a presumptive rule. The FASB standard itself had a single majority shareholder exception. Likewise, the Commission's own rules regarding broadcast cross-ownership recognizes a single majority shareholder exception. There is no rational basis not to allow for the same exception in the cellular-PCS cross-ownership rules.

adopt attribution rules that more accurately reflect the control a party has over a cellular carrier. CBT was not allowed to participate in the auction as it would have been allowed had the Commission heeded CBT's warnings and either adopted the rule proposed by CBT, granted CBT's request for a waiver of the cellular attribution rules, or stayed the auction. It is time for the Commission to correct the defects in the rules and restore the full eligibility of CBT to participate in PCS.

Respectfully submitted,

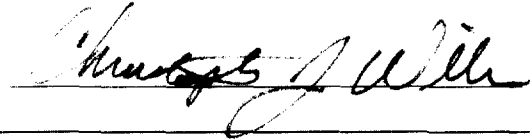
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The undersigned hereby certifies that a copy of the foregoing Comments of Cincinnati Bell Telephone Company was served by first class mail, postage prepaid, upon the parties listed below this 15th day of April, 1996.



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